Norshuime bin Baharudin (sole administrator for the estate of Baharudin bin Mahmud, deceased) v Leong Yee Heng and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(NCVC)(W)-264–02 OF 2017 AND B-02(NCVC)(W)-265–02 OF 2017
BADARIAH SAHAMID, VERNON ONG AND ZALEHA YUSOF JJCA
26 JUNE 2019

Civil Procedure — Judgment — Consent judgment — High Court declared consent judgment as null and void — Appellant appealed against High Court's decision — Whether consent judgment should be set aside

Contract — Specific performance — Sale and purchase agreement — First sale and purchase agreement ('SPA') entered by appellant with caveat — Respondent then entered into second SPA — High Court allowed the specific performance of second SPA — Appellant appealed against High Court's decision — Whether second SPA valid and enforceable

These two appeals were against the decision of High Court at Shah Alam in the Suit No 22 NCVC-459–09 of 2014 ('the said suit'), in allowing the plaintiff's claims for the orders of: (a) specific performance of the sale and purchase agreement dated 11 March 2010 between the plaintiff and Baharudin bin Mahmud ('the deceased'); and (b) the declaration that the consent judgment dated 23 July 2014 between the first defendant and the second defendant was declared null and void and caused to be dismissed. The appellant in appeal B-02 (NCVC)(W)-264–02 of 2017 was the defendant in the said suit, while the appellant in appeal B-02 (NCVC)(W)-265–02 of 2017 was the second defendant in the said suit. The disputes in the said suit revolved around a piece of land known as PM 2101, No Lot 51910, Tempat KM 17, Jalan Puchong, Mukim Petaling, Daerah Petaling, Negeri Selangor with the address at Lot No 6, Batu 11, Jalan Puchong, 47100 Puchong, Selangor ('the said land'). On 3 October 2006, the deceased entered into a sale and purchase agreement ('2006 SPA') with the second defendant. Pursuant to the 2006 SPA, the second defendant had on 22 January 2007 lodged a private caveat on the said land. The second defendant failed to pay the balance purchase price even after the expiry of four months grace period ie the extended completion date. On 4 July 2007, the plaintiff wrote an offer letter to the deceased to buy the said land. The deceased had accepted the offer by putting his signature onto it. The offer letter was subject to a condition precedent that the deceased was to ensure the removal of caveat No 180/2007 within six months from the date of the

offer letter. Upon learning of the offer letter, the second defendant filed a Suit No 22–1675 of 2007 ('2007 Suit') against the deceased on 25 September 2007 for specific performance of the 2006 SPA. On 11 March 2010, the plaintiff entered into a sale and purchase agreement ('2010 SPA') with the deceased although the caveat No 180/2007 was not removed and the 2007 Suit was pending. The 2010 SPA was subject to conditions precedent that the deceased must cause the second defendant's claim in 2007 Suit to be dismissed and his caveat to be removed. The deceased passed away on 14 November 2012 and the first defendant who was the son of the deceased was appointed as the administrator of the deceased's estate. Before entering into the consent judgment, the first defendant informed the plaintiff that the second defendant had made an offer and the first defendant agreed to enter into the consent judgment with the second defendant in 2007 Suit. The issues by the plaintiff were: (i) whether the High Court could set aside the consent judgment entered in 2007 Suit; and (ii) whether the 2010 SPA was enforceable.

Held, allowing appeal with costs of RM30,000 here and below subject to allocator fee:

(1) A consent judgment could not be set aside unless special exception was shown that there involved illegality, lack of jurisdiction and fraud. In the instance, none was proven. The defendants entered into the consent judgment of their own free will. The first defendant never concealed the fact that he was going to enter into consent judgment from the plaintiff. No illegality or fraud involved. The issue of lack of jurisdiction obviously did not arise. There was no vitiating factor which undermined the consent judgment. It was therefore misplaced for the plaintiff to now argue that there would be grave injustice to allow the consent judgment to stand as the plaintiff was fully aware of the intended consent judgment and was not doing anything to stop it. The plaintiff failed to bring himself within the special exceptions (see paras 22 & 25).

(2) Since the plaintiff was not privy or party to the consent judgment, it followed that he had no right to set it aside. The court agreed with the first defendant that the mere fact the plaintiff's name was mentioned did not give him the automatic right to set aside the consent judgment. Even though the plaintiff was not a party to the consent judgment, it was found that it was no wrong to include his name in the consent judgment. There was no good reason for the High Court in the said suit to set aside the consent judgment in 2007 Suit. The fact that the Court of Appeal had set aside the summary judgement obtained by the second defendant against the first defendant and ordered the 2007 Suit fixed for full trial merely meant that that there were issues to be tried in the 2007 Suit. It did not stop parties from settling the matter out of court by entering into

the consent judgment. The High Court judge erred when opined that the consent judgment was against the order of Court of Appeal (see paras 26–29).

(3) It was a condition precedent of the 2010 SPA that the first defendant to cause the 2007 Suit to be dismissed. It could not and would never happen as the parties had entered into the consent judgment. The plaintiff was informed by the first defendant and knew about the intended consent judgment but had not done anything to stop it. The plaintiff hence could not put the blame on the first defendant as if the plaintiff was ignorant of what was happening. The three years period as stated in the condition precedent had long expired. Although the plaintiff claimed that he had extended the period, there was no evidence to show that the first defendant knew or had received the letter of extension. The 2010 SPA was not enforceable as its condition's precedent had not been fulfilled (see paras 34–37).

[Bahasa Malaysia summary

Dua rayuan ini adalah terhadap keputusan Mahkamah Tinggi di Shah Alam dalam Guaman No 22 NCVC-459–09 Tahun 2014 ('guaman tersebut'), yang membenarkan tuntutan-tuntutan plaintif bagi perintah-perintah tersebut: (a) pelaksanaan spesifik perjanjian jual beli bertarikh 11 Mac 2010 antara plaintif dan Baharudin bin Mahmud ('si mati'); dan (b) deklarasi bahawa penghakiman persetujuan bertarikh 23 Julai 2014 antara defendan pertama dan defendan kedua diisytiharkan terbatal dan tidak sah dan menyebabkannya ditolak. Perayu dalam Rayuan B-02 (NCVC)(W)-264–02 Tahun 2017 adalah defendan dalam guaman tersebut, manakala perayu dalam rayuan PM 2101, No Lot 51910, Tempat KM 17, Jalan Puchong, Mukim Petaling, Daerah Petaling, Negeri Selangor dengan alamat di Lot No 6, Batu 11, Jalan Puchong, 47100 Puchong, Selangor ('tanah tersebut'). Pada 3 Oktober 2006, si mati telah memasuki perjanjian jual beli ('PJB 2006') dengan defendan kedua. Menurut PJB 2006, pada 22 Januari 2007 defendan kedua telah memasuki kaveat persendirian di atas tanah tersebut. Defendan kedua telah gagal membayar baki harga belian meskipun selepas luput empat bulan tempoh senggang iaitu lanjutan tarikh siap. Pada 4 Julai 2007, plaintif telah menulis surat tawaran kepada si mati untuk membayar tanah tersebut. Si mati telah menerima tawaran itu dengan menurunkan tandatangannya pada surat tersebut. Surat tawaran itu tertakluk kepada prasyarat bahawa si mati perlu memastikan keluaran kaveat No 180/2007 dalam tempoh enam bulan dari tarikh surat tawaran itu. Setelah mengetahui tentang surat tawaran itu, defendan kedua memfailkan Guaman No 22–1675 Tahun 2007 ('Guaman 2007') terhadap si mati pada 25 September 2007 untuk pelaksanaan spesifik guaman 2006. Pada 11 Mac 2010, plaintif telah memasuki perjanjian jual beli ('PJB 2010') dengan si mati walaupun kaveat No 180/2007 tidak dikeluarkan dan Guaman 2007 masih belum selesai. PJB 2010 tertakluk kepada prasyarat

A bahawa si mati harus menyebabkan tuntutan defendan kedua dalam Guaman 2007 ditolak dan kaveatnnya dikeluarkan. Si mati telah meninggal dunia pada 14 November 2012 dan defendan pertama yang merupakan anak lelaki si mati telah dilantik sebagai pentadbir harta pusaka si mati. Sebelum memasuki penghakiman persetujuan, defendan pertama memberitahu plaintif bahawa B defendan kedua telah membuat tawaran dan defendan pertama bersetuju untuk memasuki penghakiman persetujuan dengan defendan kedua dalam Guaman 2007. Isu-isu oleh plaintif adalah: (i) sama ada Mahkamah Tinggi boleh mengetepikan penghakiman persetujuan yang dimasuki dalam Guaman 2007; dan (ii) sama ada PJB 2010 boleh dikuatkuasakan.

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Diputuskan, membenarkan rayuan dengan kos RM30,000 di sini dan di bawah tertakluk kepada fi alokatur:

(1) Penghakiman persetujuan tidak boleh diketepikan kecuali pengecualian istimewa dapat ditunjukkan yang melibatkan kebersalahan D undang-undang, tiada bidang kuasa dan penipuan. Dalam kes ini, tiada apa-apa yang dibuktikan. Defendan-defendan telah memasuki penghakiman persetujuan secara sukarela. Defendan pertama tidak menyembunyikan fakta bahawa dia akan memasuki penghakiman E persetujuan daripada plaintif. Tiada kebersalahan undang-undang atau penipuan yang terlibat. Isu tiada bidang kuasa jelas tidak timbul. Tiada faktor tidak sah yang melemahkan penghakiman persetujuan. Oleh itu ia tidak berasas untuk plaintif kini berhujah bahawa ketidakadilan akan berlaku jika penghakiman persetujuan dibenarkan untuk kekal kerana F plaintif menyedari tentang tujuan penghakiman persetujuan itu dan tidak berbuat apa-apa untuk menghalangnya. Plaintif telah gagal menunjukkan pengecualian yang istimewa (lihat perenggan 22 & 25).

(2) Oleh kerana plaintif bukan privi atau pihak kepada penghakiman persetujuan, ia diikuti bahawa dia tiada hak untuk mengetepikannya. G Mahkamah bersetuju dengen defendan pertama bahawa hanya dengan fakta yang nama plaintif dinyatakan tidak memberinya hak automatik untuk mengetepikan penghakiman persetujuan itu. Walau pun plaintif bukan pihak kepada penghakiman persetujuan itu, adalah didapati bahawa ia tidak salah untuk memasukkan namanya dalam penghakiman H persetujuan itu. Tiada sebab baik untuk Mahkamah Tinggi dalam guaman tersebut mengetepikan penghakiman persetujuan dalam Guaman 2007. Fakta bahawa Mahkamah Rayuan telah mengetepikan penghakiman terus yang diperoleh oleh defendan kedua terhadap defendan pertama dan memerintahkan Guaman 2007 ditetapkan untuk I perbicaraan penuh hanya bermaksud bahawa terdapat isu-isu yang perlu dibicarakan dalam Guaman 2007. Ia tidak menghalang pihak-pihak daripada menyelesaikan perkara itu di luar mahkamah dengan memasuki penghakiman persetujuan. Hakim Mahkamah Tinggi terkhilaf apabila berpendapat bahawa penghakiman persetujuan adalah terhadap perintah

Mahkamah Rayuan (lihat perenggan 26–29).

(3) Ia adalah prasyarat PJB 2010 agar defendan pertama menyebabkan Guaman 2007 ditolak. Ia tidak boleh dan tidak akan berlaku kerana pihak-pihak tersebut telah memasuki penghakiman persetujuan. Plaintif telah diberitahu oleh defendan pertama dan mengetahui tentang tujuan penghakiman persetujuan itu tetapi tidak melakukan apa-apa untuk menghalangnya. Plaintif dengan itu tidak boleh menyalahkan defendan pertama seperti plaintif tidak menyedari apa yang berlaku. Tempoh tiga tahun sebagaimana dinyatakan dalam prasyarat telah lama luput. Walau pun plaintif mendakwa bahawa dia telah melanjutkan tempoh itu, tiada keterangan menunjukkan defendan pertama mengetahuhi atau menerima surat lanjutan. PJB 2010 tidak boleh dikuatkuasakan kerana prasyaratnya tidak dipenuhi (lihat perenggan 34–37).]

Notes

For cases on consent judgment, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5172–5190.

For cases on sale and purchase agreement, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7422–7427.

Cases referred to

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697; [2007] 6 CLJ 93, FC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd [2015] 1 MLJ 284; [2015] 2 MLRA 348, CA (refd)

CIMB Bank Bhd v Veeran a/l Ayasamy [2015] MLJU 993; [2015] 5 MLA 603, CA (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697, SC (folld)

Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761, FC (refd)

Lai Kee Peng (Messrs Lai Kee Peng & Assoc) v Tay Hup Lian [2016] 2 MLJ 21; [2016] 4 CLJ 1, FC (refd)

Loi Hieng Chiong v Kon Tek Shin [1983] 1 MLJ 31, FC (refd)

National Land Finance Co-operate Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (refd)

S Pakianathan v RK Stallard [1979] 2 MLJ 251, FC (refd)

Tan Chee Hoe & Sons Sdn Bhd v Code Focus Sdn Bhd [2014] 3 MLJ 301, FC (refd)

Tiong Nam Trading & Transport (M) Sdn Bhd v Commercial Union Assurance (M) Sdn Bhd [2008] 6 MLJ 342; [2008] 2 MLRA 108, CA (refd)

Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors [2000] 3 MLJ 699; [2000] 3 CLJ 666, CA (refd)

Legislation referred to

Contracts Act 1950 ss 33, 36(1)

Appeal from: Civil Suit No 22NCVC-459–09 of 2014 (High Court, Shah Alam)

Abd Shukor bin Tokachil (Sasha Lyna Abd Latif with him) (Sasha Lyna & Partners) in Civil Appeal No B-02(NCVC)(W)-264–02 of 2017 for the appellant.

AG Kalidas (K Nadarajah & Partners) in Civil Appeal No B-02(NCVC)(W)-265–02 of 2017 for the appellant.

John Yong (John Wong with him) (John Yong & Irene Song) in Civil Appeal Nos B-02(NCVC)(W)-264–02 of 2017 and B-02(NCVC)(W)-265–02 of 2017 for the respodndent.

Zaleha Yusof JCA:

[1] These two appeals were against the decision of the High Court at Shah Alam in the Suit No 22 NCVC-459–09 of 2014 ('the said suit'), in allowing the plaintiff's claims for, inter alia, the following orders:

(a) specific performance of the sale and purchase agreement dated 11 March 2010 between the plaintiff and one Baharudin bin Mahmud (the deceased); and

(b) a declaration that the consent judgment dated 23 June 2014 between the first defendant and the second defendant be declared null and void and caused to be dismissed.

[2] The appellant in Appeal B-02(NCVC)(W)-264–02 of 2017 was the first defendant in the said suit, while the appellant in Appeal B-02(NCVC)(W)-265–02 of 2017 was the second defendant in the said suit.

[3] For convenience, parties will be referred to as they were in the High Court.

BRIEF BACKGROUND FACTS

[4] The disputes in the said suit revolved around a piece of land known as PM 2101, No Lot 51910, Tempat KM 17, Jalan Puchong, Mukim Petaling, Daerah Petaling, Negeri Selangor with the address at Lot No 6, Batu 11, Jalan Puchong, 47100 Puchong, Selangor Darul Ehsan ('the said land'). The said land was registered under the name of the deceased.

[5] On 31 October 2006, the deceased entered into a sale and purchase agreement with the second defendant ('2006 SPA'). Pursuant to the 2006 SPA, the second defendant had on 22 January 2007 lodged a private caveat on the said land (caveat No 180/2007). According to cl 2 of the 2006 SPA, the balance purchase price shall be due and payable three months from the date of the agreement. If the purchaser fails to pay within this period, the vendor shall automatically grant another grace period of four months. The second defendant had failed to pay the balance purchase price even after the expiry of four months grace period ie the extended completion date.

[6] On 4 June 2007, the plaintiff wrote an offer letter to the deceased to buy the said land. The deceased had accepted the offer letter by putting his signature onto it. The offer letter was subject to a condition precedent that the deceased was to ensure the removal of caveat No 180/2007 within six months from the date of the offer letter.

[7] Upon learning of the offer letter, the second defendant filed a Suit No 22–1675 of 2007 ('2007 Suit') against the deceased on 25 September 2007 for specific performance of the 2006 SPA. We need to mention that the consent judgment which the plaintiff sought to set aside was entered in the 2007 Suit.

[8] On 11 March 2010, the plaintiff entered into a sale and purchase agreement ('2010 SPA') with the deceased although the caveat No 180/2007 was not removed and the 2007 Suit was pending. The 2010 SPA was also subject to conditions precedent that the deceased must cause the second defendant's claim in 2007 Suit to be dismissed and his caveat to be removed.

[9] The deceased passed away on 14 November 2012 and the first defendant who was the son of the deceased was appointed as the administrator of the deceased's estate.

[10] It was not disputed that the defendant had applied to intervene in the 2007 Suit but his application was dismissed by the High Court. It was also not disputed that it was the plaintiff who introduced Messrs Yusof Khan & Fong to represent the first defendant in the 2007 Suit and it was the plaintiff who paid all the legal fees to Messrs Yusof Khan & Fong.

[11] Before entering into the consent judgment, the first defendant informed the plaintiff that the second defendant had made an offer and upon the advice of Messrs Yusof Khan & Fong, the first defendant agreed to enter into the consent judgment with the second defendant in 2007 Suit.

[12] As earlier alluded to, the consent judgment in 2007 Suit was entered on 23 June 2014. On 19 September 2014, the plaintiff filed the said suit which is now the subject matter of the appeal before us.

ISSUES

(a) whether the High Court in the said suit can set aside the consent judgment entered in 2007 Suit; and

(b) whether the 2010 SPA was enforceable.

DECISION OF THE HIGH COURT

[13] The decision of the learned High Court judge on the first issue can be found in paras 40–42 of His Lordship's grounds of judgment which we reproduce as follows:

> [40] Mengikut terma-terma Penghakiman Persetujuan Guaman 2007 tersebut plaintif dikehendaki 'memulangkan' geran hakmilik asal tanah tersebut kepada defendan pertama bagi membolehkan pemindahan kepada defendan kedua dilaksanakan seterusnya. Penghakiman persetujuan tersebut dimasuki antara defendan pertama dan kedua tanpa melibatkan plaintif. Plaintif dinafikan peluang/hak untuk bersuara sedangkan kesan penghakiman persetujuan tersebut mengikat plaintif amat kamat memprejudis plaintif. Saya mendapati tindakan ala serang hendap yang dilakukan oleh defendan pertama dan kedua ke atas plaintif adalah suatu yang tidak mengikat plaintif.
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> [41] Dalam kes *Lai Kee Peng v Tay Hup Lian* [2016] 4 CLJ 1 mahkamah telah memutuskan perintah sedemikian tidak boleh dikuatkuasa atau mengikat pihak yang bukan merupakan pihak dalam kes/tindakan berkenaan. Dalam kes *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666 Mahkamah Rayuan memutuskan bahawa:
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> > It is a fundamental principle of our system that only a party to proceedings may be bound by an order made therein.
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> [42] Saya mendapati defendan pertama dan kedua telah berpakat dan bersekongkol untuk memastikan tuntutan plaintif bagi mendapat hak ke atas tanah tersebut dikecewakan. Pada hemat saya tindakan defendan pertama dan kedua merekodkan penghakiman persetujuan tersebut berniat jahat. Pada hemat saya kerana tamak dengan tawaran harga yang jauh lebih tinggi daripada defendan kedua, defendan pertama secara terang-terangan sanggup membelakangi terma/syarat yang telah dipersetujui oleh arwah bapa beliau/si mati berhubung harga tanah. Maka, saya mendapati penghakiman tersebut adalah tidak sah dan dengan itu adalah diketepikan.

[14] It was one of the terms of the consent judgment that the plaintiff to return the original land title to the first defendant to enable him to effect the transfer of the land to the second defendant. As the plaintiff was not a party to

the 2007 Suit, the learned High Court judge was of the view that the consent judgment did not bind the plaintiff. As can be seen from the judgment as cited above, His Lordship relied on the case of *Lai Kee Peng v Tay Hup Lian* and the case of *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors*.

[15] His Lordship was also of the view that the first and second defendants had colluded to frustrate the 2010 SPA. Their action had invalidated the consent judgment, hence the consent judgment can be and was set aside.

[16] On the second issue, the learned High Court judge was of the view that since the second defendant had failed to comply with the term of the 2006 SPA regarding payment, the deceased was at liberty to terminate the 2006 SPA and to enter into 2010 SPA. Although the second defendant had obtained a summary judgment order against the first defendant in 2007 Suit, the order was set aside by the Court of Appeal and the Court of Appeal had ordered for the 2007 Suit be fixed for a full trial. Thus, His Lordship opined that the consent judgment was against the order of the Court of Appeal. In His Lordship's view, the 2010 SPA was still valid and enforceable as the precondition or the period to challenge the 2007 Suit and the removal of the caveat No 180/2007 had been extended by the plaintiff in accordance with the term of the 2010 SPA.

OUR DECISION

Whether the High Court in the said suit can set aside the consent judgment entered in 2007 Suit

[17] All learned counsels for the parties, be it for the first or second defendants respectively or for the plaintiff, had cited the decision of the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, to support their arguments on this issue. Based on *Badiaddin*, both learned counsels for the defendants argued that a consent judgment cannot be set aside unless in exceptional cases such as illegality, lack of jurisdiction or breach of rules of natural justice. They argued, mere collusion to conspire or 'berniat jahat' is not a ground to set it aside. It was also not true that the rules of natural justice had been breached that the plaintiff had been deprived of the right to be heard, as the plaintiff had knowledge of the intended consent judgment from the beginning and yet did not do anything to stop it. They further argued, since the plaintiff was not a party to the consent judgment, he has no right to set it aside. Learned counsels for the dependents also cited, inter alia, the following cases to support their arguments: *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697; *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761; *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699;

A [2000] 3 CLJ 666, *Tiong Nam Trading & Transport (M) Sdn Bhd v Commercial Union Assurance (M) Sdn Bhd* [2008] 6 MLJ 342; [2008] 2 MLRA 108 and *Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd* [2015] 1 MLJ 284; [2015] 2 MLRA 348.

B **[18]** On the part of the plaintiff it was argued that grave injustice was a valid ground to set aside the consent judgment. Learned counsel for the plaintiff cited Peh Swee Chin FCJ's judgment in *Badiaddin*, which at pp 418–419, inter alia, stated the following:

C > The grounds referred to for setting aside a consent order of a judgment by consent are grounds which basically relate to consensus ad idem or the free consent of parties to a binding agreement or contract. It is elementary that if it is proved that there are grounds which vitiate such free consent, the agreement is not binding. Now a consent order or a judgment by consent is undoubtedly based on an agreement of
D > both parties where consent to the agreement must or should have been free in the first place. If the agreement upon which a consent order or judgment by consent is based, is vitiated by any ground recognized in equity as vitiating such free consent, such as fraud, mistake, total failure of consideration (see *Huddersfield Banking Co v Henry Lister* [1895] 2 Ch 273 and the cases cited therein), then such a perfected
E > consent order or judgment by consent could be set aside in a fresh action filed for the purpose.

[19] Hence he argued there would be grave injustice if the consent judgment was allowed to stand as the plaintiff did not consent to it.

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[20] Other than *Badiaddin*, he also cited, inter alia, the following cases to strengthen his argument; *S Pakianathan v RK Stallard* [1979] 2 MLJ 251, *Khaw Poh Chuan*; *Yee Seng Plantation*; *Lai Kee Peng (Messrs Lai Kee Peng & Assoc) v Tay Hup Lian* [2016] 2 MLJ 21; [2016] 4 CLJ 1.

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[21] It seems, other than *Badiaddin*, all parties also relied on the same case of *Khaw Poh Chuan*, and the case of *Yee Seng Plantations*. The passage in *Badiaddin*, which was quoted by learned counsel for the plaintiff as shown
H above, had also been quoted by learned counsel for the second defendant in his written submission. Thus, it is obvious and undisputed that only parties to the consent judgment can be bound by it.

[22] We had considered the arguments put forth by the parties including the
I authorities cited. It was our considered view that the law on the setting aside of a consent judgment was and is clear. As the Federal Court in *Badiaddin* ruled, a consent judgment cannot be set aside unless special exception is shown that it can be proven that there involves illegality, lack of jurisdiction and fraud. In the instance, we found none has been proven.

[23] The learned High Court judge opined that the first and second defendants had colluded to frustrate the plaintiff's right over the land. But collusion alone is not fraud. The Federal Court in *Loi Hieng Chiong v Kon Tek Shin* [1983] 1 MLJ 31 had stated the following:

> As regards the law, it has been said that the courts have so far not ventured to lay down as a general proposition what amounts to fraud. It can only be determined from acts and circumstances of a particular case. It usually takes the form of a statement of what is false or a suppression of what is true. Where the relative position of the parties is such as raises the presumption of an unconscientious use of power arising out of the circumstances and conditions, the transaction cannot stand unless the person claiming benefit of it is able to repel the presumption by contrary evidence proving to have been in point of fact, fair, just and reasonable per Lord Selborne, LC in Earl of *Aylesford v Morris* (1); See also *Fry v Lane* (2).
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> In *Derry v Peek* (3) it was held that to establish fraud it is necessary to prove the absence of a honest belief in the truth of that which has been stated; in the words of Lord Herschell 'Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belied in its truth; or (3) recklessly, careless whether it be true or false'.

[24] The Court of Appeal in *CIMB Bank Bhd v Veeran a/l Ayasamy* [2015] MLJU 993; [2015] 5 MLA 603 had stated as follows:

> The elements of fraud and/or conspiracy must be proved by clear, cogent and convincing evidence. There must be something more than mere failure or an omission on the part of the third defendant. There can never be fraud and/or conspiracy cannot exit, where the intent to deceive does not exist.

[25] The defendants entered into the consent judgment of their own free will. In fact before entering into it, the first defendant had obtained the advice of Messrs Yusof Khan & Fong, the very same lawyer who was appointed by the plaintiff himself to fight the 2007 Suit. And the plaintiff was aware of this as he was informed by the first defendant. Yes, the second defendant had offered a higher purchase price but the plaintiff had also done the same when he offered an increased purchase price to the deceased in order to buy the said property knowing fully well of the pending 2007 Suit. The first defendant never concealed the fact that he was going to enter into consent judgment from the plaintiff. Hence we did not find any illegality or fraud involved. The issue of lack of jurisdiction obviously did not arise. There was also no vitiating factor which undermined the consent judgment. Being fully aware of the intended consent judgment and not doing anything to stop it, it was therefore misplaced for the plaintiff to now argue that there would be grave injustice to allow the consent judgment to stand. We found the plaintiff had failed to bring himself within the special exceptions as pronounced by *Badiaddin*.

[26] Further, we were also of the view that since the plaintiff was not privy or a party to the consent judgment, it follows that he had no right to set it aside (see *Tiong Nam Trading* and *Boustead Naval Shipyard*). The most he could do was to ask the court to set aside only clauses which mentioned his name but not the whole consent judgment (see *Khaw Poh Chuan*).

[27] However, we agreed with the first defendant that the mere fact the plaintiff's name was mentioned did not give him the automatic right to set aside the consent judgment. This was because the plaintiff, as we mentioned earlier and reiterate it now, knew about the 2007 Suit from the beginning and was the one who introduced and appointed Messrs Yusof Khan and Fong to act for the first defendant and even paid the legal fees to the lawyers on behalf of the first defendant. Hence, as submitted by the first defendant, and we agreed, the first defendant was fighting the 2007 Suit for the plaintiff and the plaintiff was in actual fact using the first defendant to fight the case from behind the scene. In *Dewan Undangan Negeri Kelantan*, it was, inter alia, held by the Supreme Court:

> (6) As to the contention that the declaratory order should not have been made because the Election Commission and the incumbents of the state seats, namely, Haji Samat and Haji Mahmud, were directly affected but were not before the court, the court found that the appellants were in reality fighting the suit on behalf of Haji Samat and Haji Mahmud. In the circumstances, there was no principle of law which disentitles the court from disposing of the case by making a declaration of title in the respondents' favour.

[28] Applying the same principle to the instant appeal, based on the facts of the case, even though the plaintiff was not a party to the consent judgment, we found it was not wrong to include his name in the consent judgment.

[29] Based on the above, we found there was no good reason for the High Court in the said suit to set aside the consent judgment in the 2007 Suit. We need also emphasise the fact that the Court of Appeal had set aside the summary judgment obtained by the second defendant against the first defendant and ordered for the 2007 Suit be fixed for full trial merely means that there were issues to be tried in the 2007 Suit. It does not stop parties from settling the matter out of court by entering into the consent judgment. Hence the learned High Court judge erred when His Lordship opined that the consent judgment was against the order of the Court of Appeal.

Whether the 2010 SPA was enforceable

[30] The 2010 SPA was subject to conditions precedent. Learned counsels for each defendant argued that the 2010 SPA was not enforceable as the conditions precedent had not been met. Learned counsel for the plaintiff, on

the other hand argued that the 2010 SPA was still valid as the plaintiff had extended the period for the conditions to be fulfilled.

[31] The conditions precedent referred to above can be found in cl 2 of the 2010 SPA. We reproduce the said clause as follows:

> 2. Condition Precedent:
>
> It is hereby expressly agreed and declared that the following shall be conditions precedent of this agreement:
>
> 2.1 The Vendor(s) shall at his own cost and expenses to cause the claim to be dismissed by the court and shall serve a copy of fair order of such dismissed on the purchaser's solicitor;
>
> 2.2 The Vendor(s) shall at his own cost and expenses remove or caused to be removed the Third Party Caveat and other encumbrances, lien, claim and caveat. A copy of the land search shall be delivered to the Purchaser's Solicitors evidencing that the said Property is free from all encumbrances, lien, claim and caveat;
>
> 2.3 In the event that such conditions are not fulfilled within Three (3) years from the date of this agreement or such longer period as the purchaser(s) may at his absolute discretion grant, the Purchaser(s) shall have the right to terminate this Agreement. In the event the Purchaser elect to terminate this Agreement then all monies paid by the Purchaser(s) within Seven (7) days from the receipt of notification of termination by the Purchaser(s) or the Purchaser(s)'s Solicitors, failing which the Vendor(s) shall pay to the Purchaser(s) interest at the rate of eight per cent (8%) per annum calculated on daily basis on the amount then due and owing by the Vendor(s) to the Purchaser(s) form the date the same is due until the whole sum thereof, including interest thereto is fully realized and thereafter this Agreement shall be null and void and neither party shall have any claim against the other party save for any antecedent breaches.
>
> Upon the aforesaid conditions precedent being complied with, this Agreement shall become unconditional (hereinafter referred to as 'the unconditional date').

[32] The above clause clearly shows that the 2010 SPA was a conditional agreement or contingent contract which could only be enforceable once the conditions precedent were fulfilled. The Federal Court in *National Land Finance Co-operate Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211, which decision was later followed by another case of Federal Court in *Tan Chee Hoe & Sons Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301, had explained the effect of a contingent conditions in a contract as follows:

> The question is therefore whether the requirement as to FIC approval for completion of the proposed sale is a contingent condition or a promissory condition. A contingent condition, as we have already referred to, is a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, and the non-fulfilment of the condition does not render either

party liable in damages to the other; whilst a promissory condition, on the other hand, is an essential term of the contract, the breach of which entitles the innocent party to treat itself as discharged from the contract and to sue for damages.

In *Aberfoyle*'s case a condition in a sale agreement that the completion of the sale of the land was conditional upon the vendor obtaining the renewal of the lease which was the subject matter of the sale from the State Government was held by Their Lordships of the Privy Council to be a contingent condition and not a promissory condition. We confess we cannot see any difference between this condition and the requirement for FIC approval in the case under the present appeal. To us the requirement belongs to the category of contingent conditions the nonfulfillment of which negates the existence of any contractual relationship between the parties to complete the agreement.

[33] On the same issue, ss 33 and 36(1) of the Contracts Act 1950 (Act 136) are also relevant. The sections provide:

33 Enforcement of contracts contingent on an event happening

(a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

(b) If the event becomes impossible, such contracts become void.

ILLUSTRATIONS

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

36 *When contracts become void which are contingent on happening of specified event within fixed time*

(i) Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, the event has not happened, or if, before the time fixed, the event becomes impossible.

[34] It was a condition precedent of the 2010 SPA that the first defendant to cause the 2007 Suit to be dismissed. This obviously cannot and will never happen as the parties had entered into the consent judgment. Based on ss 33 and 36(1) of the Contracts Act 1950, the 2010 SPA has now become void. But learned counsel for the plaintiff had cited another Federal Court's decision in *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697 at p 728; [2007] 6 CLJ 93 at p 137 which said:

(32) where a party by his own act makes it impossible for him to perform his contract at the due date, there is a constructive breach of contract, and the other party is entitled forthwith to enforce his rights as on a breach.

[35] With due respect, the instant appeal can be distinguished. The first defendant never put the plaintiff out of the picture. As we had found earlier, the plaintiff was informed by the first defendant and knew about the intended consent judgment but had not done anything to stop it. Hence he cannot now put the blame on the first defendant as if the plaintiff was ignorant of what was happening.

[36] Further, the three years period as stated in the condition precedent had long expired. Although the plaintiff claimed that he had extended the period, there was no evidence to show that the first defendant knew or had received the letter of extension.

[37] Based on the above we were of the considered view that the 2010 SPA was not enforceable as its conditions precedent had not been fulfilled.

CONCLUSION

[38] We were of unanimous view that there were merits to these appeals. We therefore allowed the appeals with costs of RM30,000 here and below to each of the appellants, subject to payment of allocator fee. We also ordered the deposit to be refunded to the respective appellants.

Appeal allowed with costs of RM30,000 here and below subject to allocator fee.

Reported by Mohd Kamarul Anwar